United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7472

Original

To be argued by
JESSEL ROTHMAN, P.C.

71-5138

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEE WOLFMAN, individually and on behalf of himself, and all other stockholders of INSTITUTE OF PATTERN DESIGN, INC., TV CONSUMER PRODUCTS CORP., FASHION SEWING GUILD, INC., (A NEW YORK CORPORATION) and FASHION SEWING GUILD, INC., (A DELAWARE CORPORATION),

Plaintiffs-Appellants,

-against-

MORTON P. WEISS, SHIRLEY WEISS, NORMAN LIPPMAN, INSTITUTE OF PATTERN DESIGN, INC., TV CONSUMER PRODUCTS CORP., FASHION SEWING GUILD, INC., (A NEW YORK CORPORATION) FASHION SEWING GUILD, INC., (A DELAWARE CORPORATION, and GOLDEN RULE INTERNATIONAL, INC., (A NEW JERSEY CORPORATION).

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANTS

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BRIEF ON BEHALF OF PLAINTIFF-APPELLANTS, INSTITUTE OF PATTERN DESIGN, TV CONSUMER PRODUCTS CORP., et al

Issues Presented for Review

1. Did the court properly align the parties according to their interest in order to properly determine the jurisdiction of this Court in diversity cases, specifically:

(a) Was the residence of the plaintiff Lee Wolfman ("Wolfman") determinative of the issues of jurisdiction?

(b) Was the court correct in determining the issue of antagonism of Institute of Pattern Design, Inc. ("IPD") and TV Consumer Products Corp. ("TVCP") where said corporations did not appear to defend the action?

2. Was the defendant Norman Lippman ("Lippman") barred from raising the issue of diversity on the eve of trial?

Statment of the Case

Preliminary Statement

This is an appeal as a matter of right from an Order of the United States District Court for the Southern District of New York, Cannella, J., which dismissed sua sponte the plaintiffs' action on the grounds of lack of subject matter jurisdiction.

The District Court

The district court held that based upon the caption on the face of the original complaint, there was no complete diversity since the residence of Wolfman had to be included in determining the issue of diversity where the individual defendants, Morton P. Weiss ("Weiss") and Shirley Weiss were residents of the State of New Jersey at the time the action was commenced. (A-90) The court also held that notwithstanding the fact that Wolfman was not a resident of the State of New Jersey at the time the supplemental amended summons and complaint was served, his prior New Jersey residence would also defeat the jurisdictional requirements of this court when a New Jersey corporation, Golden Rule International, Inc. ("Golden Rule") was named as a party defendant. (A-90)

The court further concluded that IPD and TVCP must be aligned as defendants, and not as party plaintiffs. After asserting that Wolfman's residence was determinative of the issues, the court further stated that "It did not reach the plaintiff-appellants argument that Wolfman is only a nominal party whose citizenship should not be considered for diversity purposes." (A-102)

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* References herein bearing the prefix letter "A" are to the Appendix.

Statement of Facts

This action was commenced on November 24, 1971 in the District Court for the Southern District of New York. On that date, and prior thereto, the following facts are undisputed:

(a) IPD was and is a Delaware corporation incorporated on March 30, 1970.

(b) TVCP was and is a Delaware corporation incorporated on February 19, 1970.

(c) On November 24, 1971, neither corporation was actively engaged in doing business in any state.

(d) Prior to November 24, 1971, both corporations had offices for doing business in the State of New York for most of their corporate life, and that for the period of May through June of 1971, IPD had offices at 2357 Lemoine Avenue, Fort Lee, New Jersey, but those offices were closed prior to June 30, 1971, and prior to the institution of the present action. (A-98-100)

(e) As of November 24, 1971, both the stock in each of the aforesaid corporations was owned 50% by the Weiss group, and 50% by the Wolfman group. Both groups had an equal number of directors on the Board of Directors. Weiss was the President and operating head, and Wolfman was the secretary-treasurer.

(f) On November 24, 1971, Wolfman was a resident of the State of New Jersey, but he was not a resident of the State of New Jersey on November 2, 1973 (the date the motion was made to serve and file the supplemental amended summons and complaint, adding Golden Rule as a party defendant), nor was he a resident of said state as of December 23, 1973 (the original date that said supplemental amended summons and complaint was to be filed), nor was he a resident of the State of New Jersey on March 29, 1974 (the date upon which the supplemental amended summons and complaint was originall filed), nor in April of 1974 when the supplemental amended summons and complaint was served. He was a resident of the State of New York.

(g) Weiss and his wife, Shirley, were residents of the State of New Jersey on November 24, 1971, but subsequently thereafter, Weiss moved to the State of Florida, and has always remained a resident of the State of Florida.

(h) Fashion Sewing Guild, Inc. ("Fashion") [two corporations] were nominee corporations of IPD. Fashion was formed in the State of Delaware on December 7, 1970, and in the State of New York on January 26, 1971.

(i) Lippman is a certified public accountant residing in the State of New York. He was the accountant for Weiss, IPD, TVCP, Fashion and Golden Rule.

(j) Golden Rule was and is a corporation organized and existing under the laws of the State of New Jersey, and was incorporated on September 17, 1971 by Weiss without the knowledge and consent of IPD, Fashion or Wolfman. Weiss was the sole stockholder of Golden Rule.

(k) IPD, Weiss and Wolfman agreed to act as the distributors in the United States of a sewing pattern book published by Modeverlag Lutterloh, known in the United States as the "Golden Rule Book".

(l) It was agreed that a contract was to be entered into with Modeverlag Lutterloh with a corporation to be formed (said corporation was Fashion.)

(m) IPD, Wolfman, Weiss and Fashion retained Lippman, their accountant, to act as their negotiating agent in obtaining the rights to distribute the "Golden Rule Book" in the United States.

(n) Between November 20, 1970 and November 23, 1970, Lippman went to Germany and entered into a contract in behalf of Fashion and TVCP, and IPD caused a check in the sum of $10,000 to be issued to Modeverlag Lutterloh to purchase 2,000 "Golden Rule Books".

(o) In June (July?) of 1971, at a meeting in which all of the then existing plaintiffs were present, Weiss advised those present that the sale of sewing pattern books was no longer

profitable, and that the then existing corporations should liquidate and go out of business.

(p) Approximately one week thereafter, Weiss closed all offices of the existing corporations, took the corporate books with him and moved to a location unknown to Wolfman.

(q) Weiss thereafter, either under the name of Fashion or after September of 1971 in the name of Golden Rule, sold the 2,000 books purchased from Modeverlag Lutterloh, and continued to reorder and sell those books, retaining all of the profits thereof for himself. All of this without the knowledge and consent of Wolfman, IPD and TVCP.

(r) Between June (July?) of 1971 through November of 1971, Weiss also sold and diverted other assets of IPD and TVCP without the knowledge and consent of Wolfman, TVCP and IPD.

Court Proceedings

November 24, 1971	Wolfman commenced a stockholders' derivative action in behalf of IPD, TVCP and Fashion against Weiss, Lippman, naming in the caption as defendants, IPD, TVCP and Fashion, (the caption followed the recommended form as found in Benders Forms of Pleadings, Exhibit "A" hereto annexed). The complaint, pursuant to F.C.R.P. 23.1, stated that because Wolfman and Weiss were both 50% stockholders and represented 50% of the Board of Directors, that Wolfman had not requested the corporation to bring an action against Weiss (¶15 of the original complaint). (A-7,8, and 9)

December 21, 1971 (The Answer)	Lippman originally appeared in this action by his attorney, Adolf R. Siegel, and filed a verified answer on December 21, 1971, and did not raise the issue of diversity or any jurisdictional issue. (A-16) The defendant Weiss appeared originally by the firm of Eckhaus, Guston & Hoffman with an undated, unverified answer which raised the issue of jurisdiction in its answer. (A-21)
November 21, 1972	As a result of Mr. Weiss's illness and his residence in the State of Florida, Mr. Weiss finally was physically able to appear for a deposition on this date. However, he did not have any books and records, claiming all of the books and records were in the hands of Lippman.
April 12, 1973 (Pre-trial Conference before Magistrate Raby)	No one appeared for Weiss and the pre-trial conference was adjourned to May 16, 1973. Lippman was to have his deposition taken prior to May 16, 1973, but it was not.
May 16, 1973	Mitchell Horne was substituted as attorney for Weiss for Eckhaus, Guston & Hoffman.
September 10, 1973	Weiss appeared for the taking of his testimony, but referred all substantive matters to Lippman.
October 16, 1973	Lippman testified that Fashion never conducted any business and that the sale of the "Golden Rule Book" from Modeverlag Lutterloh was conducted under the name of Golden Rule, a New Jersey corporation. On advice of his attorney, Lippman refused to produce any records involving Golden Rule since that corporation was not a party defendant.

November 9, 1973	Plaintiffs moved for leave to serve an amended supplemental summons and complaint adding Golden Rule, a New Jersey corporation, as party defendant. (A-43)
December 3, 1973	Judge Cannella confirmed Magistrate Raby's recommendation to permit the pleadings to be amended, with amended pleadings to be filed within 20 days from December 3, 1973. (On that date Weiss was a resident of Florida and Wolfman was a resident of New York). (A-48, A-53)
February 21, 1974 March 18, 1974	Motion made and granted to extend time to file amended summons and complaint until March 18, 1974. (A-54)
May 20, 1974	None of the defendants filed an answer to the amended summons and complaint, and none of the defendants moved to comply with discovery motions. An appropriate motion was therefore made.
July 26, 1974	Magistrate Raby filed his recommendation which read in part: "Motion #2 represents a continuation of the efforts by plaintiffs' counsel to obtain access to the corporate books and records of the defendant Golden Rule. Counsel for plaintiffs first attempted to obtain those records from Golden Rule's accountant, the defendant Lippman, who refused to produce the records on the ground that he had no authority to do so, since they were not his records, but those of Golden Rule. Accordingly, counsel for the plaintiffs obtained permission from this Court to file a supplemental summons and complaint naming Golden Rule as an additional defendant. Mitchell Horne, Esq. agreed at a conference before me on April 16, 1974, to accept service

of process against Golden Rule and to answer the complaint by April 30. However . . . he neglected to file an answer . . ." (A-77)

August 26, 1974

Lippman, by his new attorneys, D'Amato, Costello & Shea, filed his answer to the supplemental amended summons and complaint. Said answer did not raise the issue of diversity. (A-80) No other defendants filed their answers, and the defendant Lippman refused to move forward without joinder of issue by the defendants who were to be represented by Mitchell Horne, Esq..

Neither the defendant Weiss, or Golden Rule or IPD or TVCP, or Fashion filed an answer in this action, other than the original answer filed by the firm of Eckhaus, Guston & Hoffman on behalf of Weiss and Shirley Weiss. At one of the innumerable pre-trial conferences on motions made between July 26, 1974 and March 8, 1975, it was agreed that the original Weiss answer would be the answer to the supplemental amended complaint on behalf of Weiss and Golden Rule.

March 8, 1975

At a pre-trial conference held before Judge Cannella, it was ordered that the case be placed on the court's ready day calendar subject to immediate trial on telephone notice. The case was never tried because of an application by the defendant Lippman for an adjournment because Mr. Lippman's son had to undergo a serious operation.

May 7, 1975	Motion made by plaintiff to strike the defenses and counterclaims found in the answers of the defendants Weiss, Golden Rule and Lippman. (A-84) Said motion was returnable on May 21, 1975. The defendants Weiss and Golden Rule never opposed that motion and never filed answering papers of any type. The defendant Lippman requested an adjournment to June 18, 1975, and that request was granted. (A-86) Between June 18, 1975 and July 23, 1975, the defendant Lippman never filed opposing papers.
June 26, 1975	Plaintiff requested a decision on its motion of May 7, 1975, and that the relief sought therein should be granted by default, and the matter set down for inquest. (A-88)
July 17, 1975	By letter, the defendant Lippman sought a conference to be held on July 23, 1975, to discuss, for the first time, the question of diversity. (A-90)
July 23, 1975	Judge Cannella treated this conference as a return date of a motion which was never made, to dismiss the complaint on the grounds of lack of diversity. The attorney for the plaintiff was served, for the first time with a memorandum of law on the issue of diversity. The court, on the motion of the plaintiff, adjourned the matter to July 25, 1975 at 9:30 a.m. to submit opposing papers. (A-92)
July 25, 1975	The court, at 9:30 a.m., without reading the opposing papers, and without having the courtesy to hear argument on the part of the plaintiff, granted the motion of the defendant Lippman. (A-92)

The Contention of Appellants

The contention of the Appellants is that the proper alignment of the parties is as follows: IPD, TVCP, plaintiffs against Weiss, Golden Rule, and Lippman, defendants. That Wolfman and Fashion must be disregarded in determining jurisdiction in that they are neither conditional, necessary or indispensable parties. That the only proper, necessary and indispensable parties were the said corporations and the defendants Weiss, Lippman and Golden Rule. That the court was in error when it stated that Wolfman had brought this action in an individual capacity, (citing the caption of the action as proof of that assertion). The court was further in error by mechanically applying the jurisdictional allegations required by F.R.C.P. 23.1 contained in Paragraph "15" of the Amended Complaint, and thereupon holding that merely by said compliance with the formal requirements of the statute, TVCP and IPD were antagonistic to Wolfman, notwithstanding that said corporations had not appeared in this action to defend against the allegations asserted in the complaint of the diversion of funds and assets by Weiss and Lippman, and where it further appeared that in the relief sought in the complaint, no relief was sought by the plaintiff, but the sole relief sought was in behalf of TVCP and IPD.

Appellants, therefore, contend that the court was in error when it dismissed the complaint for lack of jurisdiction.

ARGUMENT

POINT I

THERE BEING NO ANTAGONISM ON THE PART OF INSTITUTE OF PATTERN DESIGN, INC., OR TV CONSUMER PRODUCTS CORP., SAID CORPORATIONS ARE THE PARTY PLAINTIFFS AND THEREFORE THE JURISDICTIONAL REQUIREMENTS OF 28 U.S.C 1332 ARE MET.

The principle of complete diversity applies to proper, conditionally necessary, and indispensable parties. Moore, Vestal & Kurland, Moore's Manual Federal Practice and Procedure (2 Volumes) §5.06.

A corporation on whose behalf a derivative action is maintained is an indispensable party. Matthies v. Seymour Mfg. Co. 270 F.2d 365,377 n. 2 (2d Cir. 1959) cert. denied, 361 U.S. 962,80 S.Ct. 591, 4 L.Ed. 2d 554 (1960).

Where it appears that management is not aligned against the stockholder and does not defend the course of conduct complained of, then the corporations are the party plaintiffs and the stockholder who commenced the action, is no longer a conditionally necessary or indispensable party, but is merely a formal or nominal party, whose domicile does not determine diversity jurisdiction. Swanson v. Traer 354 U.S. 114 77 S.Ct. 1116. Raese v. Kelly 59 F.R.D. 612 (1973). Opici v. Cucamonga Winery Co., et al 73 F. Supp. 603.

Therefore, the domicile (residence) of Wolfman is not determinative on the issue of diversity.

There is no question that a derivative stockholders' action may be maintained in the Federal Courts, provided that all other jurisdictional requirements are met. (Rule 23.1 FRCP)

In 1905, the United States Supreme Court established the "antagonism" test in aligning parties in order to determine diversity jurisdiction. Doctor v. Harrington 1905, 25 S.Ct. 355, 196 U.S. 579, 49 L. Ed.606. Thereafter, in the cases of Smith v. Sperling 354 U.S. 93 and Swanson v. Traer, Supra, the antagonism test was both amplified and clarified. As a result of the aforesaid cases, it appears that if management of the corporations involved is aligned against the commencing stockholder, and defends the course of conduct which he attacks, the corporation is "antagonistic" and will be aligned as a party defendant, if by doing so jurisdiction is retained in the Federal Courts. See Smith v. Sperling 354 U.S. 93 at 97.

On the other hand, in Swanson v. Traer supra, it appears that where the corporate entity is not aligned against the commencing stockholder, and does not defend the course of conduct he attacks, the corporation is not "antagonistic", and thus is the party plaintiff, where, by doing so, Federal jurisdiction is retained.

In this instant action, management is not aligned against the commencing stockholder. Management, (Mr. Weiss was the only operating officer), did not choose to file a Notice of Appearance on behalf

of Institute of Pattern Design, Inc. or TV Consumer Products Corp., but only chose to appear in behalf of Weiss personally.(A-21) Therefore, under the rationale of Swanson v. Traer supra, TV Consumer Products Corp. and Institute of Pattern Design, Inc. are to be aligned as party plaintiffs.

Rule 17 FRCP mandates that all actions be maintainted by the real party in interest. It is clear since the sole entity seeking relief are the corporations, that they are the real parties in interest.

In Opici v. Cucamonga Winery Co., supra, the plaintiff, a one-third stockholder, commenced a stockholders' derivative action against the remaining stockholders. The corporation was a California corporation, and the remaining stockholders (defendants) were also California citizens. The defendants moved to dismiss the complaint on the grounds of lack of diversity. The defendants alleged that notwithstanding the fact that the plaintiff was a New Jersey resident, he sued as a representative of the Cucamonga Winery Co., a California corporation. Therefore, the California corporation was in fact the plaintiff suing the defendants who were also California itizens. That Court held that as a matter of law, in a stockholders' derivative action, the stockholder acts in a purely representative capacity (3 Pom Eq. [3d Ed] §1095), he is seeking redress for a corporation who is the real party in interest (the Court cited Koster v. ((American)) Lumbermans Mutual Casualty Co. 330 U.S. 518, 67 S. Ct. 828, (decided March 10, 1947). The Court further held that were it not for the doctrine espoused in Doctor v. Harrington,

supra, it would have to dismiss the complaint. However, because of the doctrine of "antagonism", the California corporation would be considered a party defendant.

In that case, the California corporation did appear and did defend against the actions complained of by the plaintiff stockholder. In this instant action TV Consumer Products Corp. and Institute of Pattern Design, Inc. did not defend against the actions of the complaining stockholder, Wolfman. It is respectfully submitted that the reasoning in the Opici case should be followed in this case.

In determining diversity, a corporation in the first instance is a citizen of the state in which it is incorporated, and thus in this instant action, the corporations are citizens of the State of Delaware. Haymes v. Columbia Pictures Corporation 6 F.R.D. 118 (U.S. District Court, S.D., N.Y. 1954), 28 U.S.C. 1332. St. Louis & Santa Fe RR Co. v. James 1896 161 U.S. 545, 16 S.Ct. 621, 40 L.Ed. 802.

In determining jurisdiction based upon diversity of citizenship, the Court may determine the issue of citizenship at the time the action is commenced. Gavin v. Read Corporation 356 F Supp. 483.

A corporation is not only a citizen of the state by which it has been incorporated, but it is also a citizen of the State where it has its principal place of business.

It is clear from the statement of agreed facts above, that TV Consumer Products Corp. and Institute of Pattern Design, Inc.

did not have a principal place of business outside the State of Delaware (see A-10 1). The determination of the principal place of business is a question of fact, based upon the traditional tests, such as the "operating assets", and the "nerve center" or "center of gravit" tests. See e.g. National Spinning Company v. City of Washington, N.C. 312 F. Supp. 958 (E.D.N.C. 1970); Inland Rubber Corp. v. Triple A Tire Service, Inc. 220 F. Supp. 490 (D.C.N.Y. 1963); Scot-Typewriter Co. v. Underwood Corp. 170 F. Supp. 862 (S.D.N.Y.1959).

The United States District Court for the Eastern District of Pennsylvania found that these tests do not offer much assistance in determing principal place of business for a corporation which sold all of its assets and had been in the process of winding up its business affairs, but at the time of the commencement of the action, was still in existence. That Court held that where the Delaware corporation moved to dismiss a plaintiff's negligence action on the grounds of lack of diversity, that motion would be denied where the Delaware corporation did not have any offices or place of business in Pennsylvania, was not doing any business activity on the date the action was commenced, even though at the time the cause of action accrued, it had a manufacturing plant in Pennsylvania. At the time the action was commenced, the corporation had its only real existence by virtue of its incorporation in the State of Delaware, and by virtue of not having its principal place of business elsewhere. Gavin v. Read Corporation, 356 F. Supp. 483 at 487.

It is thus clear, that excluding the status of the individual stockholder Wolfman, the proper alignment of the parties is TV Consumer Products Corp. and Institute of Pattern Design, Inc. (Delaware corporations) against Morton P. Weiss (a citizen of the State of New Jersey) and Norman Lippman (a citizen of the State of New York). See Eastern Precast Corporation v. Giant Portland Cement Company 48 FRD 4; Harris Diamond Co. v. Army Times Publishing Company 280 F Supp. 273. It is respectfully submitted that the presumption that stockholders of a corporation are deemed to be citizens of the state of the corporation's domicile applies in this instant action.

It is further noted that there are two additional named party plaintiffs, Fashion Sewing Guild, Inc. (both Delaware and New York corporations). These corporations were named in the pleadings because at the time the action was commenced, it was the plaintiff's belief that Institute of Pattern Design, Inc. owned all of the stock of Fashion Sewing Guild, Inc. (both corporations), and that said corporation was selling a product purchased with the funds of the plaintiff, a sewing book known as "Golden Rule Book".

In the course of the discovery proceedings, both the defendants Weiss and Lippman, deny that Fashion Sewing Guild, Inc., either the New York or Delaware corporations, were made operable*. That all sales of the "Golden Rule Book" (the pirated asset) were

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*It must be pointed out that defendants failed to find books and records for sales for a six (6) month period, including the checkbook for that period of time, and although said sales appeared on the tax return of Golden Rule International, Inc., the advertising during that period of time was in the name of Fashion Sewing Guild, Inc..

conducted under the corporate entity, Golden Rule International, Inc.. Thus, the citizenship of Fashion Sewing Guild, Inc., (both corporations) does not determine the question of diversity since they may be dropped as parties pursuant to Federal Rule 21, FRCP.

It is clear that the underlying rationale of Doctor v. Harrington supra; Smith v. Sperling, supra and Swanson v. Traer supra, is for the Federal Courts to maintain jurisdiction where it appears that a wrong has been committed, and that a motion to dismiss is made solely to delay the remedial action. The doctrine of "antagonism" was originally set forth in Doctor v. Harrington supra to prevent the dismissal of a stockholders derivative suit where the motion was predicated upon the then presumption that stockholders are deemed to be citizens of the state of corporations' domicile.

The real holding in Doctor v. Harrington, supra is that said presumption will not be invoked, where as a result thereof the "complainants will suffer irremediable loss if not permitted to use". Doctor v. Harrington, supra 196 U.S. 579 at 589. Both the Smith v. Sperling, supra and Swanson, supra had the same effect of causing the Federal Courts to retain jurisdiction.

It is respectfully submitted that rationale should govern the decision in this instant action, in seeking to retain jurisdiction not avoid jurisdiction.

The lower court decided the issue of lack of jurisdiction on the basis that Wolfman was a New Jersey resident, and, therefore, his residency defeated the requirements of diversity on the original complaint, for Weiss, as party defendant was a resident of the State of New Jersey, and, a fortiori, there was no diversity after the service of the supplemental summons and amended complaint, for Golden Rule was a New Jersey corporation.

The lower court did not analyze the problem in the event it was incorrect, and Wolfman's citizenship was immaterial.

The Court has held that the question of diversity could be determined at the time the supplemental amended summons and complaint was served, rather than at the time of the commencement of the action. Lewis v. Odell, 503 F2d 445 (2d Cir. 1974). At that time, IPD and TVCP were still Delaware corporations (they were not doing business in the State of New York); Golden Rule was a New Jersey corporation; Weiss was a resident of the State of Florida; Lippman was a resident of the State of New York, and Wolfman had residences in both the State of New York and the State of New Jersey.

It is the appellants' contention that Wolfman's residences in either state must be disregarded for he is not the real party in interest, and that, therefore, even if one uses the date of the

service of the supplemental amended summons and complaint, the Court had jurisdiction.

POINT II

THE LOWER COURT WAS IN ERROR IN USING THE CAPTION OF PARAGRAPH "15" OF THE COMPLAINT TO DETERMINE THE ISSUE OF ANTAGONISM AND DIVERSITY

It has been generally held that it is the duty of the court, in determining whether the requisite diversity of citizenship exists, to arrange the parties with respect to the actual controversy, looking beyond the formal arrangement made by the complaint. 132 ALR Annotated, 194,(and the cases cited therein).

Thus, in Niccum v. Northern Assur. Co. (1927; DC) 17 F(2d) 160, the court said:

> "To determine whether the parties to the suit are real plaintiffs or real defendants, the courts pay very little attention to the position of the parties as fixed in the pleadings. The positions which the pleadings assigned to the several parties to the record are neither material nor controlling on the question of removability. The court will determine the real question in issue, and arrange or align the several parties on the sides of that question according to their respective interests, and if, after such alignment or realignment, it appears that diversity of citizenship exists and the amount in controversy is sufficient to bring the case within the statutory requirement, so as to entitle a party to remove the cause into the Federal court, an order will be made for such removal."

It has been further held that where the parties are merely formal, no relief being sought against them, and their presence in the action destroys diversity of citizenship between the parties plaintiff and defendant, such presence does not oust the jurisdiction of the Federal courts. Reese v. Zinn (1900 CC) 103 F 97.

One of the basis by which the court may determine whether a defendant should be aligned when the plaintiff is to look at the prayer for relief. If no relief is sought against the defendants it has been held that such defendants should ordinarily be treated as plaintiffs. Mahon v. Guaranty Trust & S.D. Co. (1917; CCA 7th) 239 F 266.

It is clear that the lower court did not follow this precept, but used a more formalistic and superficial approach to determine this vital issue. This approach was improvident in light of the fact that three years had passed since the commencement of the action. The Court, as a result of extensive motion practice and interrogatories, was fully aware that the cause of action here was by IPD and TVCP in seeking to recover monies which had been wrongfully diverted by Messrs. Weiss and Lippman from TVCP, IPD, and "The Golden Rule Book" to Golden Rule and that Wolfman had no personal interest in the law suit. That TVCP and IPD had not appeared as party defendants to challenge the allegations by Wolfman, and Wolfman sought no relief in the complaint.

The issue before this Appellate court arises in a very unusual manner.

On July 17, 1975, the only proceeding before the lower court was either a trial, or a decision on the motion by the plaintiff to dismiss the answer of both defendants, which motion was unopposed. The court had refused to decide that motion, notwithstanding the fact that no opposing papers were served within the period provided for in the stipulation extending the Appellee Lippman to file opposing papers.

On July 21, 1975, the attorney for the Appellant received a copy of a letter addressed to the lower court, which letter was dated July 17, 1975, advising the attorney for the Appellants that a conference was being held on July 23, 1975 at the office of the lower court. At the time that letter was received, there were no opposing papers, nor was a memorandum of law attached.

On July 23, 1975, when the attorney for the Appellants appeared in the United States District Court, Judge Cannella's courtroom, he was served with a memorandum of law, and was told by the court that the court was inclined to dismiss the action, notwithstanding the fact that there were no opposing papers served upon the attorney for the Appellants. At the request of the attorney for the Appellants for time to answer the opposing

the opposing memorandum of law, the Court only gave the attorney for the Appellants less than forty-eight hours to prepare opposing papers.

At 9:30 a.m. in the forenoon of July 25, 1975 (A-93-98), without hearing argument or reading the opposing papers, the lower court dismissed the action without affording the Appellants' the opportunity to move to drop parties, i.e. Wolfman, so as to remove any cloud on the issue of jurisdiction.

This Court in Lewis v. Odell, supra, approved that approach to resolving the issue of jurisdiction. Under the rationale of that case. if such a motion was granted, Wolfman would have been dropped from the cation, and the caption would have been IPD and TVCP (Delaware corporations) as plaintiffs, against Weiss, Lippman and Golden Rule as defendants. The action would have been for fraud, diversion of assets, malpractice and breach of fiduciary duties on the part of Messrs. Lippman and Weiss. Thus, all of the work, time and effort which has been expended for over three years, would not have been nullified. The lower court should have used the approach used in Lewis v. Odell, supra.

This Court held in Lewis v. Odell, supra, that where a corporation retains a neutral position in response to a stockholders derivative action, and where said corporation had no reason to oppose the law suit, said corporation was not antagonistic and would be realigned as plaintiff.

The lower court cited the case of Raese v. Kelly 59 FRD 612 as supporting its position. However, a reading of said case gives no support to the holding of the lower court herein. In that case, the United States District Court N.D., West Va. refused to be bound by the caption and arrange the parties according to their side in the dispute. In determining said alignment, the court did not only read the complaint, but read all of the pleadings. The lower court herein did not follow the same procedure, but only looked at the caption and selective paragraphs of the complaint. (A-104)

POINT III

THE APPELLEE LIPPMAN SHOULD BE ESTOPPED FROM RAISING THE ISSUE OF DIVERSITY

It is clear that the issue of whether to exercise pendent jurisdiction has been held by this Court to be one of discretion by the District Court. Rogers v. Valentine, 426 F2d 1361

Where one of the parties sought to create Federal jurisdiction on the eve of trial, this Court affirmed the lower court's refusal to amend the complaint on the eve, during and after the trial on the grounds that the Trial Judge's denial of said request was not an abuse of discretion. In this instant action, the Defendant, Lippman, never raised the issue of diversity in either his answer or amended answer. He never answered the motion to dismiss the answer of the Defendant, Weiss, who had raised that issue. The Defendant, Lippman, was in default on the motion to dismiss the answer, and the defenses raised in both answers.

CONCLUSION

It is respectfully submitted that it was an improvident exercise of discretion to permit the Defendant, Lippman, to serve an opposing memorandum of law, and it was a further abuse of discretion for the lower court to have granted said motion. The motion should have been denied.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NASSAU) ss.:

Frances Carter, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at Hempstead, New York.

That on the 29th day of December, 19 75 deponent served the within appellants brief upon the following:

D'AMATO, COSTELLO & SHEA
116 John Street
New York, N.Y. 10038

Mitchell Horne, Esq.
450 Seventh Avenue
New York, N.Y.

at the address designated by said attorneys(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in a post office-official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Sworn to before me this
29th day of December, 19 75

Lillian M. Petraglia

Frances Carter

LILLIAN M. PETRAGLIA
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-7344490
Qualified in Nassau County
Commission Expires March 30, 1976